No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Laborers' International Union of North America ("LIUNA") began as a union of construction workers, founded in 1903 by a group of hod carriers and related construction tradesmen who came together to secure better livelihoods for themselves and their families. Since that time, our union has grown to roughly half a million members throughout the United States and Canada. LIUNA today represents men and women working across multiple industries in the private sector, from construction to energy to manufacturing, and in the public sector, including employees who serve state and local governments and federal workers within the National Guard, Indian Health Services and other agencies. LIUNA represents over 85,000 public sector workers who, among other things, help collect our garbage, build roads and bridges, operate our schools and court systems, and maintain our water and sewer systems.

LIUNA engages in collective bargaining and representation,[2] mainly through staff and members at the local union and district council (intermediate)

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties providing blanket consent to the filing of *amicus* briefs are on file with the Clerk.

[2] Throughout this brief, "collective bargaining" is generally used to mean both the negotiation of a collective bargaining agreement and representational activities during the term of such an agreement, such as grievance handling and other forms of contract administration, unless otherwise indicated.

levels around the country. We and our affiliates also engage in state and federal lobbying, employing registered lobbyists and bringing rank-and-file members and local leaders to Washington, D.C. and state capitals on a regular basis to communicate our concerns. LIUNA's experience and familiarity with both functions, and our standing as a major participant in the Labor Movement, give us a highly informed perspective on the issues at stake in this dispute. In particular, we can authoritatively attest to the clear-cut differences between collective bargaining and lobbying.

Additionally, LIUNA has an interest in this litigation because Petitioner named LIUNA as a defendant in proceedings below, our union represents public employees in Illinois, the situs of this case, and we and our affiliates are parties to many public sector collective bargaining agreements in Illinois and throughout the United States that require the payment of agency fees.

INTRODUCTION AND SUMMARY OF ARGUMENT

In urging the Court to overturn *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Petitioner and his *amici* assert that collective bargaining is "indistinguishable" from lobbying and the forced subsidization of a political party. (Pet. Br. at 9-10, 20, 62; Br. for the Cato Institute *et al.* ("Cato Br."), at 29; Br. of *Amici Curiae* States of Michigan *et al.* ("States Br."), at 8-9, 16.) Petitioner and his *amici* claim that public sector collective bargaining is "inherently political" because it attempts to influence government policy, citing what they believe are critical differences be-

tween collective bargaining in the public and private employment sectors. (*See, e.g.*, Cato Br. at 29-30; Pet. Br. at 3, 13.) While easy to assert in theory, this proposition is refuted by the reality of collective bargaining and the day-to-day work of labor negotiations and contract administration. This brief provides a descriptive account of that process.

Collective bargaining reflects a specialized human resources function. In practice, it is made up of activities undertaken by those who possess special knowledge and skills to help employers manage their workforces, whether public or private. These activities are rooted in, and continue to be connected to, a legal framework first established by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, which seeks to channel the competing demands of employees and employers into a constructive and orderly process for coming to agreement over terms and conditions of employment.

Public sector labor laws have borrowed from the NLRA. While important differences exist between the NLRA and various state statutes authorizing public sector collective bargaining, the actual conduct of collective bargaining negotiations in the public sector is methodologically very similar, if not identical, to the conduct of collective bargaining negotiations in the private sector. Treatises, handbooks and trainings on collective bargaining generally treat the topic as one. For those on the ground, practicing collective bargaining in either sector has its wrinkles, but the overall process is the same.

Part I of this brief addresses the "nuts and bolts" of collective bargaining, as generally practiced from a

union perspective by explicating the main components of the collective bargaining process: preliminary steps; bargaining at the table; contract administration; and union staffing practices. Part II explains that neither any state nor the federal government treats or regulates collective bargaining activities as "lobbying," reflecting a longstanding judgment over time that is consistent with our years of experience as a labor organization and that fundamentally contradicts Petitioner's central argument to this Court.

We urge the Court, in its consideration of this dispute, to stay grounded in the realities of collective bargaining and lobbying, and the separate legal structures that have heretofore governed these different realms.

ARGUMENT

I. Public Sector Collective Bargaining is a Specific Process, Rooted in Labor Law, By Which the Government Achieves Workforce Stability

A. Preliminary Steps

Consistent with LIUNA's experience, workshops on the nuts and bolts of collective bargaining helpfully begin with a discussion of preparation and preliminaries. *See, e.g.*, Conrad Bowling, *Workshop Training: Collective Bargaining and Labor Relations for New Administrators and Labor Representatives*, 0 Journal of Collective Bargaining in the Academy, Article 52 (2016), *available at*: http://thekeep.eiu.edu/jcba/vol0/iss11/52. Preliminaries include providing parties with proper notice, information gathering, identification of critical issues, and assembling a bargain-

ing team. *Id.* *See also* Robert M. Cassel, *Negotiating a Labor Contract—A Management Handbook* (BNA 4th ed. 2010) ("Cassel") at 53-69, 94-99; Maurice B. Better, *Contract Bargaining Handbook for Local Union Leaders* (BNA 2nd ed. 2017) ("Better"). Each side typically designates a lead negotiator to act as a spokesperson at the bargaining table. *Id.* Negotiating teams may also assign specific roles to other team members, such as note takers. *Id.*

On the labor side, teams are often composed of rank-and-file members, including a shop steward, and at least one union staff representative. Better, *supra*, at 6-8. Sometimes a union lawyer also participates, to work on specific issues or review a tentative agreement before a final contract is offered for ratification. Better, *supra*, at 8. Many union leaders with years of bargaining experience do not need or desire attorneys to be present throughout negotiations.

On the management side, teams are often composed of professional staff from the human resources or labor relations department of the employing government agency or entity. One or more representatives from the operational departments involved also typically participate. Cassel, *supra*, at 65-66. The management team may include, for example, a superintendent and director from a public works department. Occasionally, management may bring in staff from finance, and other departments. It is not uncommon for the management team to include an attorney or bargaining consultant.[3] Cassel, *supra*, at 55-69.

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[3] The Cornell Industrial and Labor Relations School program lists "[l]abor relations, human resource, operations and

For unions, consulting members is an important preliminary measure. Union leaders do not decide bargaining positions unilaterally. Rather, proposals are formed after the information-gathering stage, which includes communication—often elaborate—with employees in the bargaining unit. The goal is to determine what a contract should include, in the case of a new bargaining relationship, and to assess the effectiveness of existing contract provisions and formulate changes, in the case of an established relationship.

Communications can take a variety of forms: an informal poll or survey, site visits, assessment of grievances, or discussion at union meetings. Better, *supra*, at 23-31. The methods used depend upon the nature of the workforce, the size of the unit, work locations, schedules, the work culture, and how employees best communicate. For example, a maintenance worker may be better reached when someone shows up to the job in person, while office workers may prefer to send their concerns by email. In LIUNA's experience, a series of meetings may be needed to reach all or most workers. Some local unions hold special meetings at work sites to notify members of an impending contract expiration and re-negotiation. A union bargaining team may be formed at that time. Local unions also frequently announce upcoming negotiations at regular membership meet-

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finance professionals" as among those "Who Will Benefit" from its program on "Effective Collective Bargaining Skills and Strategies," *available at*: https://www.ilr.cornell.edu/professional-programs/lr203/effective-collective-bargaining-skills-and-strategies.

ings and report on negotiations at those meetings as progress is made.

Unions must manage a diversity of viewpoints and priorities among their memberships, as there are often different union constituencies or factions, each with distinct and sometimes inconsistent goals. *See, e.g.*, Charles J. Hunt, Jr., *Mediator Tactics: Strategies and Behaviors Utilized in Labor-Management Negotiations*, 6 Appalachian J.L. 263, 272-73 (2007) ("Hunt") ("[t]he makeup of labor unions is such that there can be a number of camps, so to speak, that contribute to union goals"). Employees at a fixed site may have concerns centered on their immediate work environment (breakroom, bathrooms, parking, etc.), while others may wish to change scheduling or on-call procedures. The union's harmonization of employee concerns and priorities is useful to management, as they otherwise may be raised in a haphazard or conflicting manner. *See Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 291 (1984) ("The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating.") (internal quotes omitted), citing *Abood*, 431 U.S. at 224.

As a preliminary measure, the bargaining team may also gather statistics, projections, and other data, for example, the Consumer Price Index and compensation for comparable jobs in the private sector. Cassel, *supra*, at 71-91. Teams may decide to undertake training on collective bargaining techniques, as inexperienced negotiators may need to learn how to develop and draft proposals and how to "cost out" proposals, that is, calculate the full cost to

an employer of, say, a mid-term cost of living adjustment for the entire bargaining unit over the course of the contract.[4] Cassel, *supra*, at 67, 313-44.

Once information has been gathered and analyzed, the bargaining team creates an initial proposal. This forms the basis for negotiations with management at the table.

B. Bargaining at the Table

Public sector collective bargaining, in states where it is authorized, is circumscribed in scope and tied to a legal framework. As we will show, at the bargaining table the parties' conduct is subject to a host of legal rules and principles, and their interactions proceed in a series of carefully modulated steps.

1. Ground Rules and Legal Standards

At the initial meeting, the parties enter a "joint session" at which ground rules for conducting negotiations are established and other preliminary matters are taken up, such as confirming the schedule for successive bargaining sessions. Cassel, *supra*, at 159-70.

If sessions are to occur during work hours, employees must obtain supervisor approval of relief from regular duties. It is not unusual for bargaining to extend beyond regular business hours, so the parties may place limits on the time frames for bargaining.

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[4] Costing analysis would calculate all "roll up" or total costs to an employer of granting such a raise by taking into account, for example, corresponding increases in overtime, unemployment insurance, and other forms of insurance that are affected by overall payroll costs. *See also* Better, *supra*, at 171-84.

"Ground rules" typically cover topics such as the length of meetings, "caucuses" (private meetings among negotiating team members, for one side or another, while a session is in progress, *see* Better, *supra*, at 152), "sidebars" (meetings between the lead negotiators and/or the parties' attorneys while a session is in progress, *see* Better, *supra*, at 164), meeting times and locations, policies on cancellations, as well as limits on counterproposals, publicity, adding new team members, and the particulars of how agreements will be reduced to writing and tentatively agreed upon (or "TA'ed"), among other topics. Although each set of grounds rules is different, they exist to keep the discussion tightly controlled and focused on a set of specific bargaining issues at hand.

The legal framework places limits on the bargaining process as well. Since state laws on public sector labor relations were generally adopted in the 1960s and 70s, they have been patterned on the collective bargaining framework found in the NLRA, with some variations. Deborah Prokopf, *Public Employees at the School of Hard Knox: How the Supreme Court is Turning Public-Sector Unions into a History Lesson*, 39 Wm. Mitchell L. Rev. 1363, 1366-67 (2013) (brief historical background). *Cf.* 29 U.S.C. § 158(d) (NLRA's "obligation to bargain collectively") with 5 Ill. Comp. Stat. § 315/7 (Illinois Public Labor Relations Act's "duty to bargain").

In 1935, the NLRA first established a "duty to bargain" between labor unions and covered employers, as well as "unfair labor practices" ("ULPs") that impose enforceable standards on the parties' behavior at, and away from, the bargaining table. 29 U.S.C.

§§ 158(a), (b), (d); *see generally* John E. Higgins, Jr., *The Developing Labor Law* 2-3 to 2-6 (BNA 7th ed. 2017) ("Higgins") (origins of the right to bargain collectively through representatives of employees' own choosing).

For more than eighty years, the National Labor Relations Board ("NLRB") and the courts have fine-tuned standards on a host of issues around collective bargaining, defining "good and bad faith" bargaining, bargaining "impasse," the consequences of impasse, the duty to meet at reasonable times and locations, the duty to answer relevant information requests, the duty not to circumvent the opposing party's bargaining representatives by "direct dealing" with employees or managers, the duty to maintain "status quo" work conditions during bargaining, and the delineation of mandatory, permissible, and illegal subjects of bargaining. *See generally* Higgins, *supra*, at 13-1 to 13-178.

States have adopted similar schemes, with state labor boards or commissions performing the regulatory role in the public sector that the NLRB performs in the private sector. *See* 5 ILL. COMP. STAT. §§ 315/10(a)(4) and (b)(4) (refusals to bargain collectively in good faith with labor organization or public employer) and § 315/11 (unfair labor practice procedures before the Illinois Labor Relations Board). State labor boards, in fact, often give deference to NRLB decisions. *See, e.g., City of Los Angeles v. Los Angeles City Employee Relations Com.*, 56 Cal.4th 905, 919 (2013) ("NLRA cases are persuasive authority for interpreting similar provisions of state law, including the [Meyers-Milias-Brown Act]"); *Okaloosa-Walton*

Jr. Coll. Bd. of Trustees v. Florida Pub. Employees Relations Comm'n, 372 So. 2d 1378, 1381 (Fla. Dist. Ct. App. 1979) ("We have approved PERC's reference to NLRA decisions for guidance of its own, and we ourselves have resorted to them as persuasive authority); *Maine Employees United/SACO Public Works Association/SACO Workers Alliance, Complainant v. City of SACO*, 2011 WL 6965924, at *4 ("The [Maine Labor Relations Board] and the Law Court often turn to the federal courts' construction of the National Labor Relations Act for guidance when interpreting comparable sections of Maine's collective bargaining statutes.").

State laws vary as to which matters may be proper bargaining topics. But, in general, the range of possible topics is limited to wages, hours, and conditions of employment. *See* Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 Or. L. Rev. 673, n.42 (2013) ("Rosenthal") ("Nearly all states with public sector bargaining provide by statute that wages, hours, and terms and conditions of employment are mandatory for bargaining") (internal quotes omitted). State labor relations laws generally allow collective bargaining over a smaller subset of topics than is allowed by the NLRA. As commentators have noted, many states have chosen to take certain topics off the collective-bargaining table, including wage rates and benefits. *See* Rosenthal, *supra*, at 692-94 (reviewing recent changes to state collective bargaining laws in Wisconsin, Indiana, Idaho, Ohio, and Tennessee that severely restricted or eliminated collective bargaining); Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States* (Center for Eco-

nomic and Policy Research, March 2014) (reviewing state collective bargaining rights and restrictions at 4-9), *available at*: http://cepr.net/documents/state-public-cb-2014-03.pdf.

Notably, state restrictions on the scope of collective bargaining mean that a state may prohibit the parties from discussing certain topics at the bargaining table. Rosenthal, *supra*, at 692-93, n.88 and 89 (noting Wisconsin's Act 10 limited bargaining to wage increases within a capped amount pegged to consumer price index, and Indiana restricted teachers from bargaining over school calendars, teacher evaluations, and teacher dismissal). By contrast, a state may not restrict the kinds of statements made in the course of lobbying activities, *see Citizens United v. Federal Election Commission*, 558 U.S. 310, 369 (2010) ("Congress has no power to ban lobbying itself"), although it may decline to pay attention or agree.

In sum, state regulatory schemes and the parties' ground rules together create a highly formalized setting for discussions. Collective bargaining—far from being another form of government lobbying—is a formal process with technical rules, grounded in historic federal labor laws, and the analogous labor laws of the state involved.

2. Opening Statements

Many parties customarily present "opening statements" at the outset of joint bargaining sessions that serve to introduce their initial proposals. Cassel, *supra*, at 171-73. For some negotiations, the first joint meeting may consist of simply making introductions,

establishing ground rules, and exchanging opening statements. How remaining bargaining sessions proceed will depend upon the method the parties have chosen to use in bargaining.

3. Bargaining Methods, Proposals, and Solutions

For experienced practitioners, differences between public and private sector collective bargaining are necessary to be aware of, but perhaps more important is the question of which bargaining method to use. Two main approaches to collective bargaining have emerged that are often referred to as "traditional bargaining" and "alternative" styles of collective bargaining.[5] The traditional approach, also known as "positional" or "distributive" bargaining, involves the exchange of proposals and counter-proposals, with each side adopting bargaining positions that are modified as bargaining proceeds. Hunt, *supra*, at 270-71; Better, *supra*, 124-25.

The alternative model proceeds in a more cooperative mode. Brommer, *supra*, at 472. Here, the par-

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[5] Alternative bargaining methods go by many names, including "integrative bargaining" and "interest-based bargaining." *See, e.g.*, Hunt, *supra*, at 270. The Federal Mediation and Conciliation Service ("FMCS") has identified and developed several variations on alternative bargaining methods, including "Modified Traditional Bargaining," Enhanced Cooperative Negotiation," and the "Affinity Model of Collective Bargaining." Carolyn Brommer, George Buckingham and Steven Loeffler, *Cooperative Bargaining Styles at FMCS: A Movement Toward Choices*, 2 Pepp. Disp. Resol. L.J. 465, 481-90 (2002) ("Brommer"); FMCS Annual Report (2016), *available at*: https://www.fmcs.gov/wp-content/uploads/2017/01/AnnualReport2017Jan13.pdf.

ties jointly identify issues and interests at the outset, and then attempt to brainstorm options and find solutions together. *Id.* at 472-80. *See also* Better, *supra*, at 139-46. Alternative models have been generally well received and regarded as sound solutions to difficult collective bargaining situations. *See generally* Brommer, *supra*.

Regardless of which approach is used, negotiators at this stage find themselves deep "in the weeds," hacking through highly specific, often very tough workplace issues, adjusting and managing expectations on both sides of the table.

From the union perspective, an important aspect of collective bargaining is educating members about the process—that is, the efforts involved in convening a bargaining team, engaging fellow members, formulating and costing proposals, planning for bargaining and related meetings, and obtaining concessions from management. The process is an exercise in workplace democracy; it ensures outreach to employees about their work conditions and discussion of issues faced by management and fellow co-workers.

The bargaining process is not linear; positions fluctuate and proposals are frequently modified and re-packaged.[6] The parties understand there are endless variations on the outcome. Part of the work of

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[6] In this respect, too, collective bargaining differs from lobbying; the exact "positions" taken at the bargaining table are not always known in advance. Cassel, *supra*, at 244 ("Not all negotiating parties precisely identify, even to themselves, their desired settlement levels, let alone their minimum and maximum positions.").

collective bargaining consists of adjusting and calibrating statements, responses, and "positions" to the other party, in order to arrive at the best possible outcome. Often, proposals are repackaged in a deal-making effort to make them more attractive.

Issues bargained generally fall into one of two categories: "economic" (salary, benefits, and other compensation) and "non-economic" (issues such as the process for approving leave or vacation schedules). Some parties find it easier to tackle economic issues last, as they tend to be the most difficult.

As much as the process can be, at times, adversarial, the bargaining table is also where the parties find solutions. In Chicago, for example, the collective bargaining process allowed the union to provide input that helped the City collect garbage more efficiently, a win-win for everyone.[7] The success of the new system was tied to a collaborative effort between the City, its employees, and their labor unions.

4. Tentative Agreements

As the parties reach resolution on the range of issues before them, they keep a running list of "tentative agreements," or "TAs." The union's intimate knowledge of both employee preferences and employer systems like payroll means that, if an employer insists upon a smaller pay increase than employees expect, the union might concede but suggest

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[7] *See* City of Chicago, Streets and Sanitation website: https://www.cityofchicago.org/city/en/depts/streets/provdrs/streets_san/svcs/grid-garbage-collection.html.

timing the increase in such a way that maximizes benefits and minimizes harm to employees.[8]

Importantly, a party's decision to backtrack on an issue that has been TA'ed often is an indication of "bad faith bargaining" that can lead to a ULP and is, thus, generally avoided. *See* Higgins, *supra*, at 13-42 ("withdrawal of already agreed-upon provisions" one indication of "surface bargaining"), citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) and 13-53 ("withdrawal of proposals that had previously been tentatively accepted [. . .] considered [an] element[] of bad faith") and n.293 (collecting NLRB cases). *See also General Teamsters, Local 326 v. City of Milford, Delaware*, 2016 WL 491284, at *11 (Delaware Public Employee Relations Board 2016) (citing *Atlanta Hilton & Tower, supra*, and stating that among other factors withdrawal of already agreed-upon provisions may indicate lack of good faith in bargaining); *accord Prof'l Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 2012 WL 76074, at *2 (Nebraska Commission of Industrial Relations 2012). Such formal rules preventing "backtracking" do not exist in the realm of lobbying.

5. Mediation, Fact-finding, Impasse, and Interest Arbitration

If management and union negotiators fail to reach agreement on all issues on their own, many

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[8] Strategies may include, for example, "front loading" wage increases while "end loading" increases in employee health insurance co-pays. Better, *supra*, at 177 (front loading and end loading wages, generally).

state laws provide for mediation and "fact-finding" by third parties as part of the collective bargaining process. If the union and management agree, a neutral mediator may assist with negotiations or the parties may present their arguments to a neutral "fact finder" who will analyze their submissions and recommend an outcome to resolve the dispute. *See, e.g.*, 5 ILL. COMP. STAT. §§ 315/12, 315/13. Illinois, for example, requires the use of mediation prior to any strike by those public employees who are permitted to strike by statute. *See* 5 ILL. COMP. STAT. § 315/17(a)(4).

If these methods fail and the parties reach "impasse"[9], employers may be permitted to unilaterally implement their final offer, and employees may be allowed to take responsive actions, depending on what is permitted by state law. *See, e.g.*, *State of Illinois, Dept. of Cent. Management Services (Dept. of Corrections) v. State Labor Relations Bd.*, 373 Ill.App.3d 242, 253-54 (Ill. App. 2007). Alternatively, in many states, "interest arbitration"—where an arbitrator resolves the substantive contract issues in dispute—is used to resolve disputes upon impasse, particularly where employees' right to

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[9] "Impasse" is a term of art defined by the NLRB and state labor laws. *See* Higgins, *supra*, at 13-161-67; *Education Support Staff Association, NWA-Alaska v. Fairbanks North Star Borough School Dist.*, 2008 WL 4803204, at *10 (Alaska Labor Relations Agency 2008) (citing NLRB and federal cases on impasse); *King County Regional AFIS Guild v. King County*, 2017 WL 3197763, at *10 (Washington Public Employment Relations Commission 2017) (Commission's five factors to determine impasse based on NLRB law).

strike has been eliminated. *See, e.g.*, 5 ILL. COMP. STAT. § 315/14 (arbitration for security employees, peace officers, and fire fighters); CAL. GOV'T CODE § 3505.4 (mandatory interest arbitration may be required); N.Y. Civ. Serv. L. § 209 (same). *See also* Rosenthal, *supra*, at n.110 (collecting statutes on binding interest arbitration and related mechanisms); Brian J. Mallow, *Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond*, 55 Hastings L.J. 245, 246 (2003) ("Currently, about thirty states (or localities therein) have some sort of interest arbitration statute."); and Better, *supra*, at 262-63 (interest arbitration in the public sector, generally).

6. Ratification

Assuming an agreement is successfully reached, the parties typically then "ratify" the contract, with management taking the agreement to principal decisionmakers at the agency and the union taking the agreement to its members.

Most unions have established internal rules or procedures about contract ratification; courts have said that ratification of collective bargaining contracts is not a matter a matter of law but a matter of internal union affairs. *See, e.g., Shelley v. American Postal Workers Union*, 775 F.Supp. 2d 197, 207 (D.D.C. 2011). *See also* Better, *supra*, at 136-38. Accordingly, how ratification is achieved varies from union to union. Whatever the method, this step requires the bargaining team to answer questions and address employee concerns. Unless approved by a majority vote, a tentative contract will typically not be adopted.

C. Representation and Contract Administration

The conclusion and ratification of a contract does not mean the end of the collective bargaining process; rather, the process is cyclical in nature. Grievance handling and other kinds of representation and contract administration are part of the ongoing collective bargaining relationship with an employer, continuing throughout the term of an agreement. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) ("The grievance procedure is, in other words, a part of the continuous collective bargaining process.") During the term of a collective bargaining contract, the parties' relationship generally operates in a more stable manner. Employee grievances are received and heard but they are processed only through the grievance-arbitration procedure contained in the contract and are limited to violations of specific contact provisions.

Typical grievances include, for example, whether overtime was paid to the correct person pursuant to specific contract provisions, and whether a city may transfer an employee to a different work location without notice. Filed grievances are processed through a multi-step "grievance adjustment" procedure, which consists of meetings held between union and management representatives who attempt to resolve the grievance through progressively higher stages of management involvement. Meetings are most often first held with the affected employees, an on-site union representative (such as a shop steward), and an immediate supervisor. If no resolution is achieved at lower levels, the grievance is advanced

through the step procedure and ultimately may result in an arbitration proceeding,[10] where a third party neutral issues a final and binding decision.[11] *See, e.g.*, ILL. ADMIN. CODE tit. 80, § 1230.200 ("Unless mutually agreed otherwise, every collective bargaining agreement between an employer and a labor organization that covers employment subject to the Act shall contain a grievance procedure that has as its last step final and binding grievance arbitration.").

Among the most valuable roles played by unions during the life of a collective bargaining contract is that of educating employees about the contract and about their rights and responsibilities, specifically, which matters are grievable and which are not; how their compensation, fringe benefits and other benefits, such as leave policies, operate; and what their duties are in the workplace (work rules, discipline policies and procedures, etc.[12]). This role is highly valued by management. Union employees also enjoy the stability of a fixed contract and related set of doc-

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[10] Arbitration of contractual disputes during the term of a contract are not to be confused with "interest arbitration," discussed *supra* Section I.B.5.

[11] For examples of grievance-arbitration procedures used by LIUNA, *see* http://local1092.org/contracts.

[12] In addition to general work rules, many workplaces have extensive policies on, for example, absenteeism and drug abuse that are based on principles of progressive discipline and that work in conjunction with employee assistance programs. Union staff develop an intimate knowledge of such matters, while many rank-and-file employees may have little to no experience with them and may not even be aware of certain rules or programs.

uments[13] that hold an employer to the bargain struck at the table; they may call upon union staff for their expertise, and consult other union resources or websites for assistance.

In addition to playing an ongoing role filing and processing grievances and educating employees, union staff also troubleshoot miscellaneous issues on a daily basis, as they arise. Often, union representatives are able to leverage their institutional knowledge and long-term relationships with management to work out assorted lower-magnitude problems on an informal basis before they become formal complaints or grievances.

These are vital functions that require adequate resources and well-trained union staff. *See Abood*, 431 U.S. at 221 ("The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money."). In LIUNA's experience, the importance of having adequate resources to meet these needs and provide the highest level of service to our members cannot be overstated.

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[13] Wage rates and any increases are usually incorporated into the body of a collective bargaining agreement itself, while benefits are usually outlined in a "summary plan description" document that describes the plan, such as a health and welfare or retirement plan, in basic terms.

D. Union Staffing Practices

For LIUNA and many unions it is customary to employ separate, dedicated staff to handle, respectively, collective bargaining and lobbying. At the national level, LIUNA has a Construction Department for collective bargaining activities, and a completely separate Legislative Department for activities related to lobbying the Congress and the federal Executive branch. Many LIUNA affiliates, operating with smaller staffs, employ a "Political Director" or "Legislative Director" to lobby while union "Field Representatives" and "Business Managers" handle collective bargaining and grievances. Such staffing practices reflect the reality that different sets of personnel with different skills, knowledge, and contacts are generally needed to effectively execute these different functions.

II. Lobbying Laws Do Not Regulate Collective Bargaining Activities

Having described the processes of collective bargaining, we turn now to the question of its treatment in government regulation of lobbying.

Petitioner has asserted that "bargaining with the government is political speech indistinguishable from lobbying the government" (Pet. Br. at 10-11, footnote omitted), an equation that Petitioner extends to bargaining over both economic and non-economic workplace issues (*see id.* at 11, 14), and to the "[e]nforcement of a collective bargaining agreement, such as through the grievance process" (*see id.* at 14). According to Petitioner, "[a]n exclusive representative's function under the [Illinois Public Labor Relations Act] and other public sector labor statutes

is quintessential lobbying: meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties." *Id.* at 11 (footnote omitted).

If these contentions were true, then one would expect states and the federal government routinely to encompass bargaining and other forms of public sector employee representation described in Part I in their lobbying laws. All states and the United States have enacted laws that require lobbyist registration and disclosure of lobbying spending and activities. *See generally* R. Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105 (2008). This Court has upheld such requirements against First Amendment challenge because of the important role they play in "maintain[ing] the integrity" of government action and decisionmaking. *See United States v. Harriss*, 347 U.S. 612, 625 (1954); *see also Citizens United v. Federal Election Commission*, 558 U.S. at 369. But contrary to Petitioner's contentions—which he identifies as "the principal reason *Abood* was wrongly decided," *see* Pet. Br. at 10-11—neither any state nor the United States has applied its lobbying registration and disclosure laws to public sector collective bargaining.

Illinois, where this case arises and where LIUNA has substantial experience in public sector bargaining, is illustrative. The Illinois Lobbyist Registration Act ("ILRA"), 25 ILL. COMP. STAT. § 170/1 *et seq.*, defines "'lobby' and 'lobbying'" as "any communication with an official of the executive or legislative branch of State government . . . for the ultimate purpose of influencing any executive, legislative, or ad-

ministrative action." 25 ILL. COMP. STAT. § 170/2(e). The terms "[e]xecutive," "[l]egislative," and "[a]dministrative" action are defined in detail at §§ 170/2(g), (h), and (i), and none of those definitions reaches bargaining or representation in Illinois public sector workplaces.

Petitioner points out that the definition of "executive action" includes "contractual arrangement," *see* Pet. Br. at 11 n.4, evidently to suggest that the ILRA covers public sector collective bargaining. But Petitioner ignores reality. In LIUNA's experience under the ILRA and from our research, there is no indication whatsoever that the Illinois Legislature intended such coverage, or that the Illinois Secretary of State, who administers and enforces the ILRA, *see* 25 ILL. COMP. STAT. §§ 170/7, 170/11, has applied the ILRA to those activities.[14] Neither LIUNA's Illinois public sector affiliates, Respondent AFSCME Council 31, nor, it appears from our research, any other labor organization has registered or reported its public sector bargaining activity as "lobbying" under the ILRA. Illinois public sector bargaining activities are regulated instead solely as labor-management matters by the

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[14] When recently contacted by LIUNA counsel, the Director of the Secretary of State's Index Department, which oversees state lobbying, advised that he was "certain" that collective bargaining does not trigger registration under the state's lobbying law, such an interpretation had never arisen in his 15 years' experience, and he was unaware of any labor organization registering on the basis of collective bargaining activities. That advice precisely coincides with LIUNA's experience in the state.

Illinois Public Labor Relations Act ("PLRA"), 5 ILL. COMP. STAT. § 315/1 *et seq.*[15]

A review of every other state's lobbying statutes and regulations likewise finds none that specifically covers collective bargaining or other workplace representation,[16] and we have found none that the

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[15] Petitioner's Table of Authorities erroneously attributes an ILRA provision, 25 ILL. COMP. STAT. § 170/2, to the distinct PLRA (itself misidentified there as including the word "Employee" in its name).

[16] ALA. CODE § 36-25-1 *et seq.*; ALASKA STAT. § 24.45.011 *et seq.*; ALASKA ADMIN. CODE tit. 2 § 50.505 *et seq.*; ARIZ. REV. STAT. § 41-1231 *et seq.*; ARK. CODE ANN. § 21-8-401 *et seq.*; Ark. Lobbyist Rules § 500 *et seq.*; CAL. GOV'T CODE § 82000 *et seq.*; CAL. CODE REGS. tit. 2 § 18200 *et seq.*; CONN. GEN. STAT. § 1-91 *et seq.*; COLO. REV. STAT. § 24-6-300 *et seq.*; COLO. CODE REGS. tit. 8 § 1505-8; CONN. AGENCIES REGS. §§ 1-92-41 *et seq.*, 12-407(2)(i)(R)-1; DEL. CODE ANN. tit. 29 § 5830 *et seq.*; D.C. CODE §§ 1-1161.01, 1-1162.27 *et seq.*; D.C. MUN. REGS. § 3-5800 *et seq.*; FLA. STAT. §§ 11.045 *et seq.*, 112.3215 *et seq.*; FLA. ADMIN. CODE ANN. R. § 34-12.010 *et seq.*; JOINT RULES OF THE FLORIDA LEGISLATURE, 2016-2018, Joint Rule One; GA. CODE § 21-5-70 *et seq.*; GA. COMP. R. & REGS. § 189-1 *et seq.*; HAW. REV. STAT. § 97-1 *et seq.*; IDAHO CODE ANN. § 67-6601 *et seq.*; 25 ILL. COMP. STAT. § 170/1 *et seq.*; ILL. ADMIN. CODE tit. 2, § 560.100 *et seq.*; IND. CODE §§ 2-7-1-0.1 *et seq.*, 4-2-8-1 *et seq.*; 25 IND. ADMIN. CODE § 6-1-1 *et seq.*; IOWA CODE. § 68B.1 *et seq.*; IOWA ADMIN. CODE r.351-8.1 *et seq.*; KAN. STAT. ANN. § 46-200 *et seq.*; KAN. ADMIN. REGS. § 19-60-2 *et seq.*; KY. REV. STAT. ANN. § 6.801 *et seq.*; LA. REV. STAT. ANN. §§ 24:50 *et seq.*, 49-71 *et seq.*, 33-9661 *et seq.*; ME. REV. STAT. ANN. tit. 3 § 311 *et seq.*; 94-270-001 ME. CODE R. § 1 *et seq.*; MD. CODE ANN., GEN. PROVS. § 5-101, 5-701 *et seq.*; MD. CODE REGS. § 19A.07.01.00 *et seq.*; MASS. GEN. LAWS ANN. ch. 3, § 39 *et seq.*; MICH. COMP. LAWS § 4.411 *et seq.*; MICH. ADMIN. CODE r.4.411 *et seq.*; MINN. STAT. § 10A.01 *et seq.*; MINN. R. § 4511.0010 *et seq.*; MISS. CODE ANN. § 5-8-1 *et seq.*; MO. REV. STAT. § 105.470; MONT. CODE ANN. § 5-7-101 *et seq.*; NEB.

applicable regulatory body or the courts have interpreted to cover collective bargaining. And, Petitioner's twenty state *amici curiae*, while echoing his equation of bargaining and lobbying, are notably silent about how their lobbying laws actually operate. *See* States Br. at 8-9.

Where state lobbying laws encompass aspects of government "contracting," they do so in the area of procurement of goods and services. *See generally* Bryson Morgan, *Special Lobbying Considerations for State and Local Government Contractors and Bidders*, in POLITICAL ACTIVITY, LOBBYING LAWS AND GIFT RULES GUIDE, at 175-188 (Trevor Potter and Mat-

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REV. STAT. § 49-1401 *et seq.*; 4 NEB. ADMIN. CODE § 04-06-001 *et seq.*; NEV. REV. STAT. § 218H.010 *et seq.*; Nev. Legislative Comm. Regulation on Lobbying; N.H. REV. STAT. ANN. § 15:1 *et seq.*; N.M. STAT. ANN. § 2-11-1 *et seq.*; N.Y. LEG. LAW § 1-a *et seq.*; N.C. GEN. STAT. § 163A-250 *et seq.*; 18 N.C. ADMIN. CODE §§ 10C.0101 *et seq.*, 12.0101 *et seq.*; N.D. CENT. CODE § 54.05-1.01 *et seq.*; OHIO REV. CODE ANN. §§ 101.70 *et seq.*, 121.60 *et seq.*; OHIO ADMIN. CODE 101-9-01 *et seq.*, 101-11-01 *et seq.*; OKLA. STAT. tit. 74, § 4249; Okla. Ethics Comm. Rule 5 *et seq.*; OR. REV. STAT. § 171.725 *et seq.*; OR. ADMIN. R. § 199-010-0005 *et seq.*; PA. CONS. STAT. § 13A01 *et seq.*; 51 PA. CODE § 51.1 *et seq.*; R.I. GEN. LAWS § 42.139.1-1 *et seq.*; 100 R.I. CODE REG. § 40-15-1 *et seq.*; S.C. CODE ANN. § 2-17-10 *et seq.*; S.D. CODIFIED LAWS § 2-12-1 *et seq.*; TENN. CODE ANN. § 3-6-301 *et seq.*; TENN. COMP. R. & REGS. 0580-1-1-.01 *et seq.*; TEX. GOV'T. CODE ANN. § 305.001 *et seq.*; 1 TEX. ADMIN. CODE § 34.1 *et seq.*; UTAH CODE ANN. § 36-11-101 *et seq.*; UTAH ADMIN. CODE r. 623-1-1 *et seq.*; VT. STAT. ANN., tit. 2, § 261 et seq.; VA. CODE ANN. § 2-2-418 *et seq.*; WASH. REV. CODE §§ 42.17A.005, 42.17A.600 *et seq.*; WASH. ADMIN. CODE § 390-20-000 *et seq.*; W. VA. CODE § 6b-3-1 *et seq.*; W. VA. CODE R. § 158-12-1 *et seq.*; WIS. STAT. § 13.61 *et seq.*; WIS. ADMIN. CODE ETH § 16.02 *et seq.*; WYO. STAT. ANN. § 28-7-101 *et seq.*

thew Sanderson, eds., 3d ed. 2017) ("Guide 2017-2018").[17]

Some states' lobbying laws expressly exempt bargaining and other representation to make this clear. For example, New Jersey specifically exempts "any communications, matters or acts involving collective negotiations, or the interpretation or violation of collective negotiation agreements, of a labor organization of any kind." N.J. STAT. ANN. § 52:13C-27(h); *see also* N.J. ADMIN. CODE § 19:25-20.3(b)(3). Alaska's definition of "administrative action" under the state's lobbying rules excludes "the issuance of, or ensuring compliance with, an opinion or activity related to a

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[17] Relatedly, courts have distinguished procurement contracts from collective bargaining agreements in the context of evaluating state campaign finance "pay-to-play" restrictions on political contributions. *See, e.g., Dallman v. Ritter*, 225 P.3d 610, 633 (Colo. 2010) ("[T]he government does not and cannot select the union with which it contracts. Indeed, a union cannot contract with the government without first demonstrating, usually through an election, that a majority of the represented employees have chosen the specific union as their representative [..]. In fact, a negotiated collective bargaining agreement shares few, if any, common characteristics with the standard procurement contract . . . so the government lacks a sufficiently important interest to justify this sort of heavy-handed [pay-to-play] regulation."); *Communications Workers of America v. Christie*, 994 A.2d 545, 568 (N.J. Super. Ct. App. Div. 2010) ("The widely-accepted understanding of the term 'procurement' does not encompass collective bargaining agreements between a public employer and a labor union representing public workers . . . . Moreover, labor unions, unlike vendors of goods and services selected under the public bidding laws, never have to be selected based upon considerations of merit or cost . . . .") (citations omitted).

collective bargaining agreement including negotiating or enforcing the agreement." ALASKA STAT. § 24.45.171(1)(E). Michigan has specifically advised that collective bargaining by or on behalf of employees in the state's Classified Civil Service is not lobbying under state law. *See* Parks Interpretive Statement (Mich. Dep't of State Oct. 15, 1985), *available at*: http://www.michigan.gov/documents/sos/1985Oct15Parks_450089_7.pdf. All of these specific exemptions simply reinforce the universal declination of the states to embrace Petitioner's central contention that public sector collective bargaining is "indistinguishable" from lobbying.

The federal Lobbying Disclosure Act ("LDA"), 2 U.S.C. § 1601 *et seq.*, which imposes a registration and reporting regime on those who "lobby" the Congress or the federal Executive Branch, accords with these state laws. The LDA requires registration and reporting by lobbying firms, individuals who are not employed by their clients, and employers of individuals who lobby on behalf of those employers. *See* 2 U.S.C. § 1603. "Lobbyist" status, and resulting registration and reporting, depend in part upon whether "[an] individual . . . is employed or retained . . . for services that include more than one lobbying contact." *See* 2 U.S.C. § 1602(10). In turn, a "lobbying contact" includes any communication to certain congressional and Executive Branch personnel on behalf of the client regarding either "the formulation, modification, or adoption of Federal legislation (including legislative proposals)"; "the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government"; "the administration or execution of a Federal program or

policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license)"; or "the nomination or confirmation of a person for a position subject to confirmation by the Senate." 2 U.S.C. § 1602(8)(A).

Petitioner implies that the LDA phrase "administration or execution of a Federal program or policy" means that collective bargaining is covered under federal lobbying laws. *See* Pet. Br. at 11 n.4. But neither that language nor the LDA's references to a "Federal contract," *see* 2 U.S.C. §§1602(8)(A), 1602(8)(B)(ix), apply to collective bargaining. Instead, similarly to state lobbying laws, they are universally understood to apply to contracts for the procurement of goods and services. *See generally* Office of the Clerk of the House of Representatives and Office of the Secretary of the Senate, Lobbying Disclosure Act Guidance (last revised January 31, 2017), *available at*: https://lobbyingdisclosure.house.gov/amended_lda_guide.html (last visited January 16, 2018) (no references to collective bargaining); R. Schechter and D. Koffman, *Special Lobbying Considerations for Federal Contractors and Bidders*, in Guide 2017-2018 at 157-173 (same).

The LDA has never been applied to bargaining or other representational activities of unions in the federal sector. For that reason, neither LIUNA, which represents thousands of federal employees, nor, evidently, any other labor organization has been required to, or does, register and report collective bargaining activity under the LDA.

CONCLUSION

In LIUNA's experience and as is widely recognized, public sector collective bargaining is a highly structured process operating within a tailored regulatory framework. Unlike lobbying, which seeks to influence public law and government policy, collective bargaining is circumscribed by that law and policy; it is technical in nature and concerns a small subset of the population at a particular point in time in their distinct status as employees and not as constituents of government. Government, in turn, acts as an employer in this realm and not in a legislative or regulatory capacity. Put another way, collective bargaining and representation involve the activities of those already *inside* the government (an agency, its managers, employees, and their representatives), while lobbying involves the activities of those *outside* the government who seek to "access" and influence it.

Because this is so, every state and the federal government eschew treating public sector bargaining as "lobbying" and have refrained from requiring public sector unions and their staff to register and report their representational activities. Instead, these governments appropriately regulate collective bargaining in their labor-management relations laws. Such consistent and longstanding judgments about bargaining and lobbying cannot coexist with Petitioner's central premise that these activities are "indistinguishable." The Court should decline Petitioner's invitation to upset these judgments by embracing a flawed reimagining of the collective bargaining process.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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